

1 So, both of those cases were reversed. And, as I
2 told both of you -- or, perhaps, I don't know if Mr.
3 Stallworth was there when I said it, I think he was --
4 but my view of both those cases and the logic of it is
5 that, based on what I read here and based on what I've
6 been given today, because this today was the first time
7 I had heard this part of the motion, is that it would be
8 my belief that, should Mr. Kilgore testify in this
9 proceeding, that his testimony here could not be used in
10 the Prosecutor's case-in-chief. However, if, in the
11 event that there were a subsequent trial, the principles
12 discussed in Harris vs. New York that dealt with Miranda
13 issues being used to impeach -- I realize it's not a
14 completely analogous situation -- but the logic would
15 dictate that if Mr. Kilgore were to testify on this
16 motion, and if on this case he should have a retrial,
17 and testify inconsistently with the testimony that he
18 would give during this proceeding, that could be used to
19 impeach him.

20 That's my legal assessment of where we are.

21 MR. PYLE: I understand the Court's position.
22 It is likely that in the future, should this become
23 necessary, it's likely that Mr. Kilgore would be arguing
24 that it should not be admitted for any purpose, but I
25 guess we will have to let --

26 THE COURT: That certainly is something that
27 you want.

28 I mean I have given it some thought, and probably

1 not as much as you have, but I am familiar, and quite
2 familiar with at least People vs. Coleman, as having
3 been a probation officer for a number of years, and
4 having been involved in violations of probation both as
5 a prosecutor and as a probation officer in many, many
6 years gone by. I was very familiar with that case.

7 In fact, when I taught probation officers as an
8 attorney at various places throughout the state, this
9 was a case that usually got cited for what it said, and
10 I'm satisfied that it's probably true, and I'm agreeing
11 I'm extending it one more notch and just by logic
12 getting to the Harris vs. New York.

13 And my opinion on it, should Mr. Kilgore decide
14 to testify in this matter, the fact that I'm advising
15 both of you that my feelings about what they are is not
16 binding, but somebody certainly might consider it when
17 they consider whether or not Mr. Kilgore would be
18 testifying here voluntarily as a factor. I don't know
19 what they would decide or what they would think.

20 So, I'm not going to exclude the D.A., and the
21 D.A. is going to be able to cross-examine and use that
22 engine that's used by you and every defendant, for every
23 defendant you represent, on cross-examination, he has
24 the same right. The idea is to be seeking the truth.
25 And if I'm only hearing it from one side without
26 cross-examination, obviously there is no justice to
27 that.

28 MR. PYLE: I would like to call Mr. Ivan

1 Kilgore.

2 THE COURT: All right. Would you step forward
3 and be sworn?

4 **IVAN KILGORE,**
5 called as a witness on behalf of
6 the Defendant, after having been
7 first duly sworn, testified as
8 follows:

9 THE COURT: And I believe by this time Ms.
10 Boyns probably knows how to spell Mr. Kilgore's name.

11 THE CLERK: Correct.

12 THE COURT: Just to advise counsel to be
13 cognizant of the purpose of this hearing. I'm not
14 looking to re-try all of the things surrounding Mr.
15 Kilgore in this particular hearing, and hopefully it
16 will stay focused on the issues at hand.

17 MR. PYLE: My intent is to talk about the
18 events leading up to the shooting, not the shooting
19 itself.

20 DIRECT EXAMINATION

21 MR. PYLE: Q. Mr. Kilgore, you are the
22 defendant in this case.

23 A. Yes.

24 Q. Calling your attention to July 16th, 2000, where
25 did you live at that time?

26 A. 509 Sycamore in Oakland, California.

27 Q. That's an apartment building?

28 A. Yes.

1 Q. Is it also a storefront in that location?

2 A. Yes, it is.

3 Q. Were you doing some work on the storefront that
4 day?

5 A. Yes, I was.

6 Q. Did at some point it become necessary to go to
7 Home Depot for some supplies?

8 A. Yes, it did.

9 Q. Who was working with you at that time?

10 A. At the time it was a young man by the name of Sic
11 and another man by the name of Raymond Jones.

12 THE COURT: Who was the first one?

13 THE WITNESS: Sic.

14 THE COURT: S-i-c?

15 THE WITNESS: I believe so.

16 MR. PYLE: Q. Did you all go to the Home
17 Depot?

18 A. Yes, we left some time that afternoon to go to
19 Home Depot to pick up some supplies.

20 Q. Did you go by car?

21 A. Yes, we did.

22 Q. And do you recollect who drove and what car you
23 took?

24 A. I drove to Home Depot.

25 Q. Whose car did you take?

26 A. My car.

27 Q. You arrived at Home Depot, and did you purchase
28 some supplies?

1 A. Yes, I did purchase some supplies.

2 Q. And who was with you at the Home Depot?

3 A. Raymond Jones and Sic was with me at Home Depot.

4 Q. What happened after you purchased the supplies?

5 A. In the process of purchasing the supplies, I was
6 waiting at the check-out counter. I had Raymond Jones
7 pull the car around to the part so they can go ahead and
8 load the supplies while I was paying out the tag.

9 From that point we proceeded -- or should I say
10 Raymond Jones proceeded to drive from there to back to
11 the apartment complex.

12 Q. With the supplies in the car?

13 A. Yes.

14 Q. And you were headed. So, if I understand you
15 correctly, Raymond Jones is in the car, he is driving;
16 sic is in the car --

17 A. Yes.

18 Q. -- and you were in the car.

19 A. Yes.

20 Q. And you were headed back to your storefront.

21 A. Yes, we was.

22 Q. Did anything happen on the way?

23 A. Yes. As we were driving on the back streets,
24 which would have been San Pablo, as we approached 30th
25 and San Pablo, Raymond Jones made a sudden U-turn and
26 approached some individuals on the corner that he had
27 identified to be William and T.

28 Q. When you say he had identified them, how did you

1 know he had identified them?

2 A. In the process of making his U-turn, he stated
3 that there goes William and T.

4 Q. What happened after he made the turn?

5 A. As we approached the corner, I noticed T to be
6 pulling a weapon out from underneath his coat, and he
7 fired at us, and I responded by firing back at T.

8 Q. Now, did you have a weapon in the car at that
9 time?

10 A. Yes, I did have a weapon in the car.

11 Q. And how long had the weapon been in the car?

12 A. The car -- the weapon had been in the car all
13 day, since earlier that morning, some time since around
14 7:00 o'clock.

15 Q. Had you had any prior dealings with Will --
16 sorry -- the other person's name is --

17 A. T.

18 Q. -- T.

19 A. Yes. I had had some prior --

20 MR. STALLWORTH: Sorry. Objection at this
21 point as to relevancy, Your Honor.

22 MR. PYLE: I will withdraw the question, Your
23 Honor.

24 Q. Okay. If I understand you correctly now, you are
25 approaching Will and T in the car. Raymond Jones is
26 driving.

27 A. Yes.

28 Q. And your testimony is that T pulled the gun?

1 A. And fired. Yes.

2 Q. And fired. And you fired back?

3 A. Yes.

4 Q. What happened?

5 A. I noticed, as we made the turn on the corner,
6 someone had fell. And shortly after the turn, Raymond
7 Jones made a U-turn and turned back around. At that
8 moment I noticed to be William who had been struck.

9 Q. Was William the person you had shot at?

10 A. No, he wasn't. Excuse me? I didn't understand
11 the question.

12 Q. Yes. Did you intend to hit William?

13 A. No, I did not.

14 MR. PYLE: That's all of the questions I have.

15 MR. STALLWORTH: I don't have any questions
16 for him.

17 THE COURT: Thank you. You may step down.

18 MR. PYLE: We have no more witnesses to call,
19 Your Honor.

20 THE COURT: Defense rests.

21 MR. PYLE: Yes.

22 THE COURT: Prosecution?

23 MR. STALLWORTH: No witnesses by the prose-
24 cution, Your Honor.

25 THE COURT: Prosecution rests. Were there any
26 items of evidence that are --

27 MR. PYLE: We would ask to admit items A and B
28 into evidence.

1 THE COURT: I'm forgetting what they are. Oh,
2 these are the photos?

3 THE CLERK: Yes. That's it.

4 THE COURT: And what was B?

5 MR. PYLE: B was the police report state-
6 ment --

7 MR. STALLWORTH: Go ahead.

8 MR. PYLE: Yes, of the O.P.D. statement signed
9 by Bianca Moore.

10 THE COURT: Okay. I think there was testimony
11 about the salient parts of that. I don't think anybody
12 went over them line by line. So, basically the points
13 that you brought out are in the record, so I'm not going
14 to admit the documents. They will remain marked for
15 Identification only.

16 Okay. I have heard the evidence. It seems to me
17 that it's been spaced out over a bit of time. Are the
18 points that were brought out in your brief sufficient
19 for me to review in terms of this motion or now that you
20 actually have --

21 Mr. Kilgore, give me a break. Let me at least
22 talk to him sometimes.

23 Are the points that you brought out in your brief
24 sufficient for me to review with the evidence and make a
25 decision, or is there anything else that's been brought
26 out here that you would like to have further briefing
27 on?

28 As I know, in terms of the testimony particularly

1 of Ms. Levy, there probably are some things that you had
2 not heard before. That's the reason I asked.

3 MR. PYLE: I believe -- I believe there is
4 enough in the motion and the points and authorities,
5 Your Honor.

6 THE COURT: All right. It's now 10 minutes to
7 4:00. When do you want to argue it? Just in terms of
8 getting your thoughts together and looking at the notes.
9 And I realize you probably took most of the testimony
10 today, I have taken notes.

11 In this particular case I'm going to ask Mr.
12 Dohrmann, if he would, to prepare the testimony of Ms.
13 Levy, so I can have it available; okay? The officers
14 and Mr. Beers were all pretty short.

15 Right now we are without a trial. Monday we have
16 further hearings on a motion to suppress. As far as I
17 know, since we don't have a trial right now, we can
18 probably do it -- can I have our calendar?

19 MR. STALLWORTH: I should probably inform the
20 Court that I'm going to be out of the office starting
21 next Tuesday, the 25th, and I won't be returning until
22 Friday, March the 5th.

23 MR. PYLE: The 24th?

24 MR. STALLWORTH: Yes. I won't be available
25 from Tuesday, the 24th of February, through March the
26 4th, which is a Thursday. I would be back on Friday,
27 March the 5th.

28 THE COURT: That certainly fits smack into

1 what I'm doing here. What do you suggest?

2 MR. STALLWORTH: The following Friday, March
3 the -- what's that? 12th?

4 MR. PYLE: I have to be in another county that
5 day.

6 MR. STALLWORTH: We could do the week through
7 March the 8th. I'm assigned to go to trial, but I
8 wouldn't start evidence until the following week, maybe
9 the week after that, so I could conceivably take out a
10 morning through the week of March 8th, any day that
11 week.

12 THE COURT: Okay. And I could probably do
13 that also if necessary.

14 THE CLERK: Any day is available.

15 THE COURT: What do we have?

16 THE CLERK: Any day is available.

17 THE COURT: Okay. So, I would assume that you
18 probably wouldn't want to do it the day you got back.

19 MR. STALLWORTH: I would prefer not to.

20 THE COURT: How does the 10th or 11th look for
21 you?

22 MR. PYLE: Not the 11th, but the 9th or the
23 10th.

24 THE COURT: 9th or the 10th?

25 MR. PYLE: Yes.

26 THE COURT: Make it right in the middle of the
27 week, the 10th.

28 MR. STALLWORTH: Sounds fine.

1 MR. PYLE: Yes. I think counsel and I have a
2 trial that's set for that day. But since both of us --

3 THE COURT: Well, yes. Okay. So, over to
4 March the 10th, 9:00 o'clock, for argument and decision.

5 MR. STALLWORTH: Thank you, Your Honor.

6 THE COURT: Thank you.

7 (Whereupon, the evening recess was taken)

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1 WEDNESDAY, MARCH 10, 2004

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3 - P R O C E E D I N G S -

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5 ARGUMENTS AND RULING ON MOTION FOR NEW TRIAL

6 THE COURT: In the matter of People versus
7 Kilgore.

8 Could we have counsel's appearances, everyone
9 this morning, please?

10 MR. STALLWORTH: Darryl Stallworth for the
11 People.

12 MR. PYLE: Walter K. Pyle for the defendant,
13 Mr. Kilgore.

14 THE COURT: Ms. Levy, the trial attorney, is
15 also present. Mr. Kilgore is present and in custody.

16 Since we met last, I have had an opportunity to
17 review your papers; I have had an opportunity to review
18 the trial testimony; I have had an opportunity to review
19 a transcript that I asked Mr. Dohrmann to prepare for me
20 of Ms. Levy's testimony post-trial.

21 Neither side requested to file additional
22 briefing. I'm aware of the arguments that are made
23 here.

24 Mr. Pyle, anything further or clarifications,
25 since there's been some testimony, actually, since you
26 filed the papers?

27 MR. PYLE: Well, I would. Yes, I would like
28 to make a statement.

1 THE COURT: Sure.

2 MR. PYLE: The points and authorities, we
3 focused on a number of issues which I think are -- can
4 be readily resolved on legal principles.

5 We talked about the tape involving Matthew Bryant
6 and the failure to object or ask to edit the tape. We
7 believe the Matthew Bryant tape was very prejudicial
8 because it painted Mr. Kilgore in a very bad light as a
9 drug dealer and provided -- it provided evidence of
10 premeditation in which the jury easily seized upon.

11 The District Attorney has suggested that this
12 tape was properly admitted for a couple of reasons, but
13 the record reflects that Mr. Bryant initially stated
14 that he had a lack of recollection of making certain
15 statements to Sergeant Green. This was, I believe, some
16 two years previous, so it's not remarkable that he might
17 not remember everything that he said to Sergeant Green.
18 So, all we have there at that point is failure of
19 recollection.

20 But then the tape is played to Mr. Bryant, and he
21 says -- and he is asked certain questions, "Now, do you
22 remember making this statement to Sergeant Green?" He
23 said, "Yes." And, "Do you remember make that
24 statement?" He says, "Yes."

25 So, at that point, then, he said, "Yes, I did
26 make those statements." So, at that point then there
27 was no real -- well, we have the failure of recollection
28 and there is no inconsistency.

1 We mentioned, we set out in our brief People vs.
2 Sam for the proposition of lack of recollection is not
3 inconsistent with another statement, and the court in
4 that case said specifically said there is nothing
5 inconsistent between the fact that the witness in that
6 case, a fellow by the name of Tubby -- there is nothing
7 inconsistent between the fact of the witness gave a
8 statement to the officer over two years earlier, nothing
9 inconsistent in the substance of the statement and his
10 present claim of a lack of recollection.

11 Indeed, says the Sam court, the circumstances can
12 be quite consistent. So, there was no -- so, there was
13 no inconsistent prior statement, was not a ground.

14 The District Attorney, I believe -- Ms. Levy,
15 also -- stated the possible grounds would be a prior
16 consistent statement, and I believe then the argument
17 developed they were suggesting it was the prior
18 consistent statement of Raymond Jones. But that's not
19 so, either.

20 I had mentioned a case in my examination of Ms.
21 Levy of People vs. Coleman, and this is not the
22 probation case. I did not give a citation, because at
23 that time I didn't know what it was. But the citation
24 is 71 Cal.2d 1159, in particular page 1166. And in that
25 case, a witness had given a statement to his father and
26 his wife, and the prosecution sought to use that as a
27 prior consistent statement, because it was made before
28 he was arrested by the police.

1 THE COURT: What was the cite you said?

2 MR. PYLE: 71 Cal.2d 1159 and specifically at
3 pages 1166 -- 1165 and 1166, primarily on page 1166.

4 And the Court pointed out that there is --
5 everybody was overlooking the last phrase in section
6 791(b) of the Evidence Code which says this prior
7 consistent statement can be used under certain circum-
8 stances, and concludes that it can be used if, provided,
9 the statement was made before the motive of fabrication
10 is alleged to have arisen.

11 And in People vs. Coleman, they said, well, this
12 fellow Stevenson, who made the statement, there was no
13 proof that he had made that statement before the motive
14 to fabricate had arisen, because by the time Stevenson
15 made that statement, he realized he was in trouble. And
16 they pointed out the motive to fabricate arose when
17 Stevenson realized the predicament he was in. And he
18 was -- it could be very easily argued that he was not
19 making this statement off the cuff or without any
20 motive, but rather he was trying to protect himself at
21 the defendant's expense.

22 THE COURT: And how factually, just so the
23 record is clear, how does that fit into our scenario
24 here?

25 MR. PYLE: Well, this fits in very neatly,
26 because Raymond Jones, if we are trying to say it is a
27 consistent statement, statements by Raymond Jones were
28 made after he had been given a choice to become a

1 defendant or a witness. And at that point he realized
2 the predicament he was in, and his subsequent choice to
3 become a defendant -- excuse me -- to become a witness
4 instead of a defendant suggests very strongly he was
5 trying to protect himself at the defendant's expense.

6 So, I believe there is simply no legal grounds
7 for admitting the tape.

8 And, in any event, there certainly was damaging
9 and incriminating statements on the tape. Even if we
10 were to say certain statements were to be admissible,
11 the other statements were -- there certainly is no
12 reason for allowing prejudicial evidence to go in that
13 had no basis. And the tape, could at a minimum, could
14 have been edited, but I don't think we even get to that
15 part of the argument, because clearly the tape was not
16 admissible for any purpose.

17 Along that same lines, counsel stated she had not
18 interviewed Mr. Bryant. She had various reasons, but I
19 believe none of those reasons really measure up to a
20 reason not to investigate the case fully. I think she
21 could have found out in an investigation, interview of
22 Mr. Bryant would have given her additional information
23 on cross-examination. Perhaps if she had learned that
24 Mr. Bryant felt he was coerced, as mentioned, it came
25 out at trial, she could have moved to exclude his state-
26 ments entirely.

27 The evidence also showed that Bianca Moore had
28 eventually testified she could testify Mr. Ivan Kilgore

1 as the shooter, but initially she told Officer Gerbaudo,
2 G-e-r-b-a-u-d-o, immediately after the shooting some-
3 thing different, and she told Officer Olivas something
4 different, also.

5 And this information was readily available. And
6 this information, counsel did not follow up on this by
7 presenting this impeaching testimony, which is in
8 exhibits A and B at this hearing.

9 All of these things sort of fall in with the
10 construction of a defense. It's clear, I think, from
11 both from the transcript and from the hearing we had at
12 the last session that initially the defense was
13 constructed on the basis of self-defense, and the
14 questions on cross-examination and questions on direct
15 examination seemed to be -- seemed to bear that out. It
16 seemed to suggest that the defense was going to be
17 reasonable -- excuse me -- was going to be self-defense,
18 either reasonable or unreasonable self-defense.

19 And as a result that, when the strategy changed
20 after the Court made its ruling regarding 1101(c) of the
21 Evidence Code, at that point then the inconsistent
22 statements of witnesses like Bianca Moore then became
23 much more important.

24 So, the evidence in exhibits A and B, which could
25 have been brought out and emphasized, did not ever go to
26 the jury, and the jury was unaware of this important
27 evidence, which later became important in making a
28 defense based upon reasonable doubt.

1 There was also, as I believe also counsel did not
2 bring out along those same lines, Bianca Moore had said
3 the car turned around and came back and stopped. But
4 Raymond Jones had said otherwise. And the women in the
5 car that drove by. Mary Washington and the other people
6 also didn't -- didn't see this happen, but counsel made
7 no efforts to bring this to emphasize this information
8 in the testimony by Raymond Jones or otherwise.

9 The attorney for Mr. Kilgore had suggested that
10 the evidence was at the close of the State's case, I
11 believe at page 61 of the hearing and 62. At the close
12 of the State's case, the jurors could have had a reason-
13 able doubt as to whether one shot as fired or more. And
14 that that would be a basis for a reasonable doubt.

15 If we look at counsel's final argument, however,
16 we talk about there was argument and counsel had pointed
17 out to the jury, yes, one more shot could have been
18 found -- could have been fired, but there was no --
19 counsel did not suggest that it was fired by Terry
20 Dandy. The argument was that somebody could have fired
21 another shot, and the jury was left to consider, well,
22 was it the defendant, Mr. Jones?

23 THE COURT: Was there evidence as to Terry
24 Dandy? And the shot, if there were multiple shots --
25 and there was some conflict in the evidence in that
26 regard, I heard, as I recollect, no testimony about
27 where that second shot came from -- could have come from
28 the vehicle itself, although there was some evidence to

1 the contrary on that. Somebody said there was only one
2 shot from the vehicle.

3 MR. PYLE: That's correct. And the District
4 Attorney, I believe, argued a second shot could really
5 have been an echo. Mary Washington and the women in the
6 car said they heard multiple shots, but it was never --

7 THE COURT: Well, one of them said that.

8 MR. PYLE: I believe so.

9 THE COURT: As I recall, there were three
10 women in the car. One of them didn't say that, one of
11 them did, and one of them did not testify in this trial.

12 MR. PYLE: So, the defense, as it was ulti-
13 mately presented to the jury, was confusing, because I
14 believe there was a self-defense instruction, but it
15 didn't really apply to the facts, and counsel did not
16 bring out any evidence to show that it was in fact a
17 second shot fired.

18 And that, as Mr. Terry Dandy had indicated in his
19 statements to the police, there was a second shot. He
20 said there was a second shot fired, but this was not
21 brought out.

22 I think -- I think one of the officers, I think
23 Sergeant Green, made some reference at some point that
24 one of the witnesses had said there was a second shot,
25 but there was -- I don't believe he said Mr. Terry Dandy
26 said that.

27 So, there wasn't really any evidence to base this
28 defense of reasonable doubt based upon more than one

1 shot being fired, because there was no indication or no
2 suggestion where that second shot may have been fired.

3 The logical way to build a case, of course, would
4 be to say it was fired by Terry Dandy, and that if that
5 was to be the defense, then it was fired by Terry Dandy,
6 whether they would have called Terry Dandy as a witness.
7 And I think counsel said she didn't want to call Terry
8 Dandy because she thought he might not be favorable to
9 them.

10 Well, no, one of these people are going to be
11 favorable to the defendant, but it would have been a
12 possible course simply to call that witness, subpoena
13 that witness and say -- ask him, "Did you hear more than
14 one shot? No further questions."

15 So, we have discussed briefly during the examina-
16 tion -- the examination -- the examination of Kevin
17 Tomlinsonn. And counsel suggested perhaps that may
18 perhaps he -- she did open the door and perhaps, by
19 implication, perhaps that may not have been handled
20 correctly.

21 With respect to the Oklahoma prior, the Court --
22 I reviewed the transcript and the Court focused on
23 1101(c) of the evidence -- of the code, 1101(c) of the
24 Evidence Code, and we suggested that counsel should have
25 presented more specific facts as to what Mr. Kilgore's
26 testimony would have been, either in the form of a
27 hearing here at the last session or by specifically in
28 writing, the statement by Mr. Kilgore as to exactly what

1 his testimony would have been.

2 The Court noted that, and the argument had to do
3 with whether there was a similarity between what
4 happened in Oklahoma and what happened in Oakland. As
5 it came out in Mr. Kilgore's testimony, the things were
6 not similar.

7 In the Oklahoma testimony -- briefly
8 summarized -- Mr. Kilgore said, "I made a mistake. I
9 should feel like a fool. I thought he was going to pull
10 a gun on me, and he didn't."

11 In the Oakland case, the case at bar, the
12 evidence would have been, "I didn't make any mistake at
13 all. I was confronted with somebody who had a gun, and
14 I fired a shot, hit the wrong guy."

15 And so he was responding to a shot being fired at
16 him. It was not a case of negligence or accident or
17 some other similar situation, which was the case in
18 Oklahoma. And I believe --

19 THE COURT: Just in that regard, I don't know
20 that I should consider Mr. Kilgore's testimony after the
21 fact on the issue. The issue of your motion was made in
22 that regard by Ms. Levy before trial or at least at the
23 very -- Mr. Pyle, are you following me?

24 MR. PYLE: Yes.

25 THE COURT: Or at least at the very first part
26 of the trial. And it came to pass that when we were
27 looking at that motion, Ms. Levy acknowledged at Mr.
28 Kilgore's noticing it, a mistake had been made in the

1 paperwork, because initially the paperwork had both of
2 the situations, both the Oklahoma situation and the one
3 we have before us today as being a, quote, unquote,
4 mistake. However, that was corrected before the Court
5 made its ruling to the fact that, in Mr. Kilgore's
6 position, was that a shot was fired. So, that was
7 before the Court.

8 And my reasons for granting it, for allowing some
9 examination, depending on what the testimony was, it's
10 really hard sitting here to predict what the testimony
11 is going to be and the extent of the allowable cross-
12 examination. As I believe -- and I don't know that we
13 referred to it under this terminology -- but basically
14 it was the Court's belief, in terms of credibility on
15 the issue, two people lie dead at Mr. Kilgore's hands.

16 And there is a line of cases over a long period
17 of time that discussed the doctrine of chances and the
18 question of credibility. I heard that and I made my
19 decision at the time. That may be grounds for somebody
20 further down the road looking at it, depending on the
21 outcome of this motion, obviously. But certainly those
22 issues were raised by Ms. Levy correctly before the
23 motion was decided.

24 MR. PYLE: Very well, Your Honor. I will move
25 on to the issue to another related issue, which is the
26 failure to make a motion under Evidence Code section
27 352.

28 My impression from reading the transcript is that

1 this was a close question as to the admissibility of the
2 Oklahoma evidence, and this would have been -- the case
3 cried out for a request to exclude the evidence pursuant
4 to Evidence Code section 352.

5 I can think of no tactical reason not to make
6 such a request. There is no downside to it, and there's
7 certainly, had the ruling been favorable, it certainly
8 would have changed the entire -- put the entire case in
9 a different light.

10 I'm not going to belabor very much over the rest
11 of the evidence brought out at the hearing. I just
12 point out a number of things where counsel said I didn't
13 make an investigation as far as the reasonable doubt, at
14 page 62, and she didn't make an investigation as to the
15 attic, because her investigators thought it was too
16 large to get in there.

17 THE COURT: Let me talk about that for a
18 second. I wondered about it when it was a raised, and I
19 didn't really research this issue, and there may have
20 been some changes in California law. And I recognize
21 from the testimony of one officer that did go up there
22 and go back in a ways -- and looking at Mr. Beers, Mr.
23 Beers wasn't going up in that attic by any way, shape or
24 means, somebody smaller could have. But what if that
25 person -- Ms. Levy? "Yes, I have a moving picture of
26 her going around there up in the attic"?

27 But let me ask you this, Mr. Pyle: From a legal
28 standpoint, if some physical evidence had been found up

1 there, how would that have been handled by the defense?

2 MR. PYLE: Well, I think it would -- I think
3 the evidence would have been that nothing would have
4 been found up there. The implication --

5 THE COURT: Nothing was.

6 MR. PYLE: Well, it wasn't, but the officer
7 said, "I couldn't really -- I couldn't really get in
8 there and look around, because I couldn't -- I couldn't
9 get back to where --"

10 THE COURT: His testimony stands for what it
11 was, but don't say that nobody went up there. The
12 officer did get up there, and he went back as far as his
13 sized person could reasonably go. But, I agree, there
14 was some area beyond which he did not go. But the
15 question remains, and he testified, "I didn't find
16 anything." But if something had been found up there --

17 MR. PYLE: Well, then, depends on what it was.
18 If it was a shotgun, it might not be good for Mr.
19 Kilgore. We contend that nothing would have been found
20 up there.

21 THE COURT: And nothing was.

22 MR. PYLE: And the implication, as I read the
23 testimony presented to the jury, was that the shotgun
24 could have been up there, and it just wasn't found by
25 the police, because they couldn't get back there.

26 And I'm suggesting that perhaps additional
27 efforts should have been made and perhaps could have
28 been made with a smaller person, or with a mirror

1 whatever -- whatever investigative -- but you have to go
2 up there and find out how far back in the attic you can
3 go.

4 THE COURT: My concern is, if something was
5 found, obviously, it would be the defense's ethical
6 obligation to turn that evidence over.

7 MR. PYLE: Yes, I think it would.

8 THE COURT: As the record stands, they at
9 least went back as far as they could reasonably go and
10 found nothing, the size of the person that went, who was
11 decidedly, objectively, looked smaller than Mr. Beers.

12 MR. PYLE: Yes, Mr. Beers is a large man.

13 THE COURT: He is.

14 MR. PYLE: In sum, I believe the evidence
15 shows there was not adequate investigation; there was
16 not adequate presentation of the evidence; and
17 particularly the tape involving Matthew Bryant's state-
18 ment to the officers, I think particularly it was
19 damaging, and had not that come in, the outcome of the
20 trial could have been different; I think there was not
21 enough examination of -- not enough vigorous cross-
22 examination of the witnesses and not enough utilization
23 of the evidence in the Preliminary Hearing transcript to
24 try to establish a reasonable doubt defense.

25 And that's all I have to say at this point, Your
26 Honor.

27 THE COURT: Okay. I considered, in light of
28 all of the issues that you raised in your brief

1 concerning both the tape of Mr. Bryant, the failure to
2 request a hearing regarding the testimony of Mr.
3 Kilgore, should he testify, and how far that would have,
4 or it would evolve at all to allow exploration of the
5 Oklahoma incident --

6 MR. PYLE: Your Honor, there was one other
7 matter.

8 THE COURT: Let me finish, so you keep that
9 thought. I'm just going through these to make sure you
10 had a chance to touch on all of them, and I think you
11 did touch on the allegation that there was ineffective
12 assistance on cross-examination of Raymond Jones.

13 Raymond Jones; the 402 hearing about the volun-
14 tariness of his own statement; Bianca Moore. One issue
15 you didn't discuss this morning was the ballistics
16 opinion that the Court allowed Dr. Herrmann to give
17 based on his years of experience.

18 But go ahead.

19 MR. PYLE: As to that issue, I believe it's
20 covered adequately in the briefs. There was no --
21 regardless of what the evidence might have shown and
22 additional questions have been asked, as the record
23 stands, I believe he was not shown to be qualified to
24 express such an opinion. And if he was an expert on
25 those things, then his testimony about this not being a
26 shotgun -- not being a sawed-off shotgun could have been
27 offered to rebut the testimony of Bianca Moore who said
28 it did resemble a sawed-off shotgun.

1 THE COURT: All right. The other point?

2 MR. PYLE: The other point was, I think I
3 mentioned in the -- at the hearing that -- and counsel
4 did not request a jury instruction having to do with a
5 second-degree drive-by -- the difference between first-
6 degree drive-by shooting and second-degree drive-by
7 shooting resulting in death, my understanding is that
8 the special finding that would be made by the jury as to
9 second-degree murder would be premised upon an intention
10 to inflict great bodily injury; whereas, the first-
11 degree murder by driving by, the intent would be to
12 cause death. And I believe that I cannot see any reason
13 for not requesting such a finding, special finding, or
14 jury instruction to that effect.

15 THE COURT: And was there evidence upon which
16 to base that?

17 MR. PYLE: Well, I think intent is always --
18 is always -- is always before -- is always before the
19 jury.

20 There was a case, People vs. Garcia, 63 Cal.App.
21 4th 820, and the issue was, they discussed the
22 second-degree drive-by statute. And the issue is
23 slightly different from what it is here. But in that
24 case it was similar in that the defendant was charged
25 with -- he was charged with discharging -- the fellow
26 was shot. Some people were approaching the car, shots
27 were fired, and the man fell dead. And the defendant,
28 Mr. Garcia, was charged with shooting from a motor

1 vehicle with the intent to inflict death. And as it
2 ended up, they found him not guilty of first-degree
3 drive-by, but they found him guilty of second-degree
4 murder.

5 THE COURT: And did Mr. Garcia testify in that
6 case or not?

7 MR. PYLE: I believe he did testify. I
8 believe -- yes, he did. He said that he froze up and
9 somebody else took the gun from him. He basically
10 denied that he was the shooter in that case, but the
11 court ended up -- the jury ended up convicting him of
12 second-degree murder rather than first degree.

13 And the court goes on to talk about whether or
14 not this finding should have been submitted to the jury,
15 which was a legal issue in the case. But I think it
16 illustrates the principle that when it comes to a
17 question of intent, whatever the evidence is, it's
18 sufficient to find an intent to inflict great bodily
19 injury, particularly when coupled with effective argu-
20 ment of counsel.

21 There was also evidence -- it occurs to me there
22 was some evidence that Raymond Jones testified that his
23 understanding and his conversation with the defendant
24 was that they were going over there, and there was going
25 to be a fight but not necessarily any -- there was going
26 to be a confrontation, a fight, but no killing.

27 THE COURT: Mr. Stallworth, you have been
28 patient.

1 MR. STALLWORTH: Just briefly, Your Honor.

2 The People would submit that the defense motion
3 for new trial does not even come close to overcoming a
4 strong presumption that Ms. Levy's conduct falls within
5 the wide range of reasonable professional assistance.
6 The points which were brought out by Mr. Pyle in his
7 brief and in his oral presentation this morning fall
8 very short of even coming close to overcoming that
9 presumption.

10 Matthew Bryant's tape was properly admitted as a
11 form of impeachment. My moving papers reflect numerous
12 references to where Mr. Bryant's statement, after having
13 his memory refreshed from listening to the tape, that he
14 stated the statements were untrue, the result of
15 coercion, and repeatedly stated he could not remember.

16 The case cited in my brief reflects the standard
17 by which you determine whether or not a statement is
18 inconsistent. And a point in this particular case was
19 that "inconsistent" in effect is more important than
20 "contradiction" in express terms.

21 The sum of his testimony clearly showed he was
22 being inconsistent with his taped statement.

23 Even if the Court were to entertain the idea that
24 this statement was not admissible and would have ruled
25 as much had Ms. Levy objected to it, a more favorable
26 result would not have been obtained.

27 The evidence in this case was so overwhelming in
28 that it produced three eye-witnesses; consciousness of

1 guilt, Mr. Kilgore in his reporting his car stolen;
2 physical evidence which corroborated all of the
3 eye-witnesses' testimony.

4 Moving onto his discussions regarding Bianca
5 Moore, it was clearly referenced in her statements
6 during trial that she was initially afraid to identify
7 Mr. Kilgore. She repeatedly mentioned and stated in
8 trial that she knew who he was, and she had no trouble
9 identifying him. Ms. Levy's cross-examination of Ms.
10 Moore covered all of these points vigorously and
11 repeatedly.

12 The Oklahoma prior, as the Court has already
13 referenced and mentioned, was only an issue if Mr.
14 Kilgore had chosen to testify, and the Court's ruling
15 was merely that if he were to testify and evidence
16 became apparent that there was some similarity, the
17 Prosecutor would have an opportunity, after having laid
18 that foundation, to explore those certain areas.

19 And the record was clear that the Prosecutor had
20 agreed and also presented to the Court that those things
21 would take place before any reference would be made.

22 Ms. Levy testified in this hearing that it was
23 her and her client's decision not to testify for fear
24 that there may in fact be some exposure to the Oklahoma
25 prior which would not be in her client's favor.

26 The 352 issue brought up by defense counsel is of
27 no issue in this case, because the defendant did not
28 testify. He would have had to testify for the Court to

1 even consider objecting to the Oklahoma prior evidence
2 coming in under those particular issues. So, it is of
3 no consequence in this particular case.

4 I would conclude, Your Honor, by simply referring
5 to the standard that has been set for review in cases
6 where a motion for new trial based on ineffective
7 assistance of counsel has been brought before the
8 courts. And it's simply that the reviewing court should
9 avoid second-guessing counsel's informed choice and
10 tactical alternatives.

11 Ms. Levy has been an attorney for over 25 years.
12 She's had numerous trials involving serious felonies,
13 most of which have been murder. She is a criminal law
14 specialist. She is one of the finest defense attorneys
15 in this particular county.

16 Her work and her advocacy in this case is
17 unquestioned, and there is nothing in the moving papers
18 and in the presentation of this hearing to suggest
19 anything otherwise.

20 I respectfully submit to the Court that this
21 motion be denied.

22 THE COURT: Mr. Pyle --

23 MR. PYLE: Yes.

24 THE COURT: -- response, if any?

25 MR. PYLE: In response to the District
26 Attorney's statements, first, as to the tape, there is
27 one other case that I cite the Court to, People vs.
28 Parks, which is 4 Cal.3d 955.

1 THE COURT: 4 Cal.3d?

2 MR. PYLE: 955 at 960. It was 1971 case.

3 What the Court states on page 960, says the
4 witness claimed lapse of memory, and there were not any
5 new statements inconsistent -- well, I will stop there.
6 Lapse of memory. And the Court pointed out it was not
7 established that the witness was deliberately evasive or
8 that her asserted lapse of memory was untrue.

9 I think that is relevant to this District
10 Attorney's argument here.

11 The court goes on to say, which also touches on
12 this, that if it's necessary to refresh the memory of
13 the witness, it should be done out of the presence of
14 the jury through the use of a -- going to be used as a
15 prior recorded statement, it should be done out of the
16 presence of the jury.

17 THE COURT: Which we tried to do here.

18 MR. PYLE: Yes. And I suggest that was
19 adequate at that point and made the use of the tape
20 unnecessary and highly prejudicial.

21 With regard to the statements by Bianca Moore
22 that the reason why she didn't identify Ivan Kilgore as
23 the shooter, my learned opponent suggests it was because
24 she was afraid of Ivan Kilgore, but that was not really
25 brought out on cross-examination; because if that was
26 so, why would she mention him at all?

27 If she was afraid of him, one would think that
28 the logical chain of events would be that she would not

1 even mention the name. But that was not brought out.
2 That argument was not brought out on cross-examination.

3 Now, whether or not the defendant should have
4 testified, we suggested that counsel should have offered
5 to have the defendant testify. My understanding is that
6 the purpose of having the defendant testify is in order
7 to find out exactly what the testimony would have been
8 and how that would have fit in with all of the other
9 evidence. This could have been achieved if in fact Mr.
10 Kilgore's testimony had been offered.

11 And, finally, counsel suggests that all these
12 things were the result of tactics and strategy, but the
13 law of effective assistance of counsel also requires
14 that any tactics and any strategy and any decisions must
15 all be informed, with full investigation.

16 THE COURT: Let me ask you just a couple of
17 questions. First of all, the cite on Garcia again?

18 MR. PYLE: Is 63 Cal.App.4th 820.

19 THE COURT: Thank you. I have it on Coleman;
20 I have it on Clarks.

21 As I understand it, as to that final argument you
22 made, in terms of the question about whether or not Mr.
23 Kilgore could testify, you feel that, beyond the written
24 motion, that Ms. Levy made concerning that and the
25 Court's discussion and decision regarding that, saying
26 basically there is a potential that I will allow that,
27 depending on what the questioning is, that there should
28 have been some hearing at which there was some proffer

1 before the issue was taken up in front of the jury, and
2 the Court should have ruled categorically one way or the
3 other, not reserving the right to change its mind,
4 depending on what the testimony was, and what I'm after
5 for is this: I'm trying to think, Ms. Levy certainly
6 laid the foundation in the most succinct terms about
7 what Mr. Kilgore's testimony would surround, the very
8 basic premise of it, which was self-defense. And the
9 Court's ruling was based on things that were stated at
10 the time that I wasn't absolutely going to rule it out,
11 because, one, the doctrine of chances, which we referred
12 to, and the other reasons stated in the record, there
13 could be issues that go to Mr. Kilgore's credibility.
14 Those issues could be raised on direct; they could have
15 stemmed from cross-examination.

16 Your feeling was that the Court had an
17 obligation -- or, no, you didn't say that. Your feeling
18 was Ms. Levy should have asked the Court to have a
19 hearing outside the presence of the jury, and Ms. Levy
20 should have asked the Court to make a finding at that
21 point about whether or not Oklahoma was going to be
22 brought up or not, beyond her written motion.

23 MR. PYLE: Yes. And I'm not absolutely sure
24 that the Court could never change its mind on that, but
25 this is often done with, for example, the common -- the
26 common situation is, the use of prior convictions for
27 impeachment.

28 THE COURT: Well, that's pretty easy, though,

1 because it involves, for impeachment purposes -- and we
2 are sort of getting aside here -- Castro motions,
3 Beagle-Castro motions involve issues of whether the
4 enumerated offense involves moral turpitude at all, the
5 age of the prior, the circumstances. And those are
6 normally pretrial motions, again, that are done on
7 paper.

8 Circumstances are not gone into, but there is
9 conduct that can go to credibility. And we don't know
10 what's going to come out. It's fine to put it on a
11 piece of paper. It may be fine to have some sort of
12 pretrial open hearing. But hopefully you would not be
13 saying that it would tie the Court's hands, as I usually
14 don't like to do this for either side, because circum-
15 stances dictate occasionally there be a change.

16 And without my telling Mr. Kilgore and Ms. Levy
17 that, based on what I knew from the motion itself, there
18 was a possibility that those issues would come before
19 the jury, depending upon the testimony, their decision
20 was made there. And I don't know that it would have
21 changed if there had been a hearing, because it still,
22 as you just stated, could be open to change.

23 And then where would the Court's finding go?
24 Because I would have misled Mr. Kilgore and Ms. Levy,
25 and now he is up on the stand, and the jury has heard
26 what he has to say, and if the circumstances arose, I'm
27 saying, no, you have to answer that question.

28 MR. PYLE: Well, I think that's --

1 THE COURT: It puts the Court on --

2 MR. PYLE: It certainly, to a certain extent,
3 it does. And my understanding is the way these things
4 are handled is that if the -- I don't think it's an
5 insurmountable problem, even in the case that we have
6 here. But, generally speaking, if counsel asks for a
7 pretrial ruling on a particular point, the question is,
8 does the Court have enough information as to exactly how
9 the evidence will come out at trial?

10 Before the trial starts, of course, in many cases
11 the Court doesn't have enough information. And so the
12 Court -- and I think the case is People vs. Morris, and
13 I don't know if I remember the citation, I think it's at
14 53 Cal.3d, but it talks about in some situations you may
15 get a denial of an in-limine motion, but you may have to
16 renew that, because very often the evidence has changed
17 by the time you seek to introduce or bar the evidence
18 that has been talked about in the motion in limine.

19 But the case also says that if in fact you can
20 tell what the evidence will be -- in other words, if you
21 know what the evidence is going to be and there is not
22 really any room for doubt, then you don't have to make
23 that renewal of your in-limine motion, because the Court
24 has had all of the evidence before it.

25 And I think that is something along those lines.
26 I think that's what I'm saying here, that if
27 something -- I think at this point -- at the point where
28 the Court made its ruling under 1101(c) and 1101(b) and

1 all of those sections, that it seems to me there was
2 enough information, and would have been more specific
3 information available had Mr. Kilgore given specific
4 testimony as to what he was going to say on the stand.
5 I think at that point there would be enough evidence
6 that the Court could make a ruling, although its hands
7 were not tied, I think it figures in cases like People
8 vs. Morris where you say, well, nothing is perfect,
9 but -- and maybe there is a point where the defendant
10 has to take a certain chance, but at least at that point
11 he would be able to evaluate the pros and cons of it.

12 THE COURT: So, basically you would be getting
13 a theoretical as close to a guarantee and you are
14 predicting on what Mr. Stallworth's cross-examination
15 might have been, depending on his testimony at that
16 time.

17 It's a difficult question. And you have raised
18 it here, but it's difficult. It places the Court on
19 sort of the horns of a dilemma: Damned if you do and
20 damned if you don't kind of thing.

21 And it puts Mr. Kilgore and his attorney on sort
22 of the horns of a dilemma, because if they do put him
23 on, and he does testify, and part of his testimony
24 unbeknownst, maybe raising the thought none of us even
25 had, opens the door now he finds himself in a circum-
26 stance that he didn't want to find himself in. But, you
27 know, I ruled what I ruled. I appreciate your comment
28 in that regard.

1 Anything further?

2 I'd like to take a break and read these cases.

3 MR. PYLE: Yes. I think we mentioned People
4 vs. Simon in our brief where there is such a procedure
5 that was suggested by the court.

6 That's all I have to say.

7 THE COURT: All right. Thank you. Give me a
8 few minutes. I would like to read a few of these cases
9 just to clarify a couple of points in my mind. We will
10 be in recess.

11 (Whereupon, the mid-morning recess was taken)

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1 **- AFTER RECESS -**

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3 THE COURT: I have had an opportunity to look
4 at Coleman and Garcia, Clarks during the brief recess,
5 gather my thoughts a little bit in terms of what counsel
6 has said this morning. I'm not going to discuss each
7 and every issue here but have some comments about some.
8 The record speaks for itself as to others.

9 First of all, as to Matthew Bryant, I am aware
10 that the law provides -- and I think it's in CALJIC
11 2.13, maybe the last paragraph -- that if a jury finds
12 that it does not believe that -- I don't recall or I
13 don't remember -- if they disbelieve that statement,
14 that's inconsistent with an earlier statement. I
15 believe it is my obligation to at least make an initial
16 finding in that regard about whether or not the jury
17 even gets to consider that.

18 And I can tell you at this point that I did
19 consider that and I did not believe Mr. Bryant's
20 statement that he did not recall.

21 We went through the process of listening to the
22 tape and things that were rather blatant he did recall
23 and then made a statement that basically -- but he lied
24 to the police for various reasons. Other things he
25 continued not to recall, and, frankly, I did not believe
26 that. And that's an issue, it's a factual question to
27 be decided by the jury, and let them do that.

28 Overall, on the totality of it, Mr. Pyle has

1 named a number of issues here that could have been
2 presented differently or could have been presented in
3 his view more effectively. It is always easier, I
4 believe, rather than to be the person in the trial with
5 jurors and alternates sitting in the box and having the
6 action taking place right in front of your eyes, it is
7 easier to look at it in hindsight and on the printed
8 page.

9 I guess the sports analogy, which I don't mean as
10 an insult to anybody of Monday-morning quarterbacking,
11 is always easier than having to play the game on the
12 field.

13 I don't know that I have ever tried a perfect
14 case either as a lawyer or been involved in one as a
15 judge. I'm sure that there are mistakes that I have
16 made. I am certain there were when I was a lawyer. But
17 as a judge, I'm also certain that close scrutiny would
18 reveal that I have made some mistakes probably some in
19 almost every case, if I were to look closely at them.

20 The question before me is whether Ms. Levy fell
21 into that range of competency that the law requires of
22 an attorney representing a defendant in a criminal case.
23 As Mr. Stallworth noted, she has experience, broader
24 than most.

25 For instance, I am aware, and I was aware before
26 she testified to it here, she had worked as a JAG before
27 in the service, and unlike the glamor of that that you
28 see on television, basically in the trenches, you try

1 what comes.

2 I know that she was a Public Defender for a
3 period of time, and has been in private practice for a
4 long period of time, and has in fact tried cases in this
5 Court. It's refreshing to have her in court, and I try
6 not to bias my feelings about her based on that, as she
7 is very forthcoming and very direct in terms of what she
8 does.

9 I found that if there needs to be a motion filed,
10 she will file it. She's prompt in that regard. She
11 does not -- she is not one that tells me she needs to
12 have a week to get the motion together. It's normally
13 in there one day, if it's not there already at the
14 outset.

15 I believe she preserves her record well, at least
16 she has in my court in other cases as in this one.

17 And basically what I'm saying is if one reads in
18 context the entire testimony of this trial and the flow
19 of witnesses, how they went, and her tactical decisions
20 in certain regards, and the last one we talked a little
21 bit about just before the recess when we argued whether
22 or not the Court was going to consider under any circum-
23 stances allowing circumstantially the Oklahoma homicide
24 before the jury, which I decided for the reasons stated
25 at the time under certain circumstances I would allow
26 that, to me she, one, clearly fits within that range of
27 providing effective assistance of counsel.

28 As a second side to that, a corollary side to

1 that, is nonetheless if someone were to find that on one
2 of these, well, she should have done this, she really
3 should have done this, whatever that particular point
4 was, did it affect the outcome? In that regard I
5 suppose, I don't know if I'm supposed to consider this.

6 Quite frankly, the offer made in support of this
7 motion, including Mr. Kilgore's testimony, confirmed
8 some of those things that hopefully being consistent he
9 would have testified to before the court, which would
10 have been confirmation of some of the things that Mr.
11 Jones testified to -- Mr. Jones testifying before Mr.
12 Bryant in this case.

13 So, looking at the totality of this, I'm not
14 satisfied that the defense has met its burden to show
15 Ms. Levy's representation in this case was ineffective.
16 I find it fit, as I said before, well within the range
17 of effective assistance of counsel, and thus I'm denying
18 the motion for a new trial on that basis.

19 And hopefully this morning I have allowed both
20 sides to make whatever record they need to make with
21 regard to this motion.

22 Now, with regard to sentencing in this case, I
23 know that Ms. Levy is here, and I don't know if you want
24 to give this any thought or not. She is counsel of
25 record for the trial. I don't know if counsel is ready
26 for sentencing, or if there is going to be further argu-
27 ments in sentencing, or how you wish to proceed.

28 I have basically denied the motion insofar as Mr.

1 Pyle's representation is concerned, in that he was sent
2 by the Bar specifically to represent Mr. Kilgore on this
3 motion. So, at this point I think it goes back to Ms.
4 Levy.

5 How do you wish to proceed?

6 MS. LEVY: Your Honor, this is somewhat
7 unusual for me in my career, but I would urge the Court
8 not to reappoint me at this point.

9 THE COURT: I don't think I have ever
10 unappointed you.

11 MS. LEVY: I would ask to be unappointed or
12 relieved from the case. I feel at this point what has
13 happened between Mr. Kilgore and I, I don't feel he
14 would feel comfortable if I represented him in
15 sentencing, and, frankly, I would not feel comfortable.

16 So, I would urge the Court to consider, since Mr.
17 Pyle is now intimately familiar with the case, that he
18 could continue representing him at sentencing, would be
19 my request.

20 THE COURT: The issues concerning sentencing,
21 I think, are pretty narrow. I know that during the
22 course of the trial I read a case in the advance
23 sheets -- and I don't, Navarro, I think was the name of
24 it, and I don't know if that's still good law or not,
25 because I never updated it from the time of the slip
26 opinion -- but basically it seemed to indicate that the
27 use clause that was found here would be subsumed into
28 the charge.

1 MS. LEVY: The life term, I believe.

2 THE COURT: And I think that is still the
3 case, but I don't know what Mr. Pyle's position would be
4 in that regard. I don't know, for one, if he's read the
5 probation officer's report, if he is in a position.

6 MS. LEVY: Your Honor, frankly, Mr. Stallworth
7 and I had a brief conversation yesterday. Mr.
8 Stallworth had asked me regarding the probation report.
9 And if it's been prepared, I have never picked it up
10 from the Clerk's Office. So, I am not in possession of
11 it and I haven't seen it.

12 MR. PYLE: I have not seen one, either.

13 THE COURT: Well, it is an unusual situation.
14 That's for sure.

15 What's your position, Mr. Pyle, in terms of
16 representing Mr. Kilgore for the limited purpose of the
17 sentencing?

18 MR. PYLE: I'm willing to represent him at
19 sentencing, Your Honor.

20 THE COURT: Mr. Stallworth, do you have any
21 say one way or the other?

22 MR. STALLWORTH: That sounds fine to me.

23 THE COURT: There may be a copy of the
24 probation report downstairs. There may be. I have an
25 original here, and I have a copy that ordinarily
26 accompanies a prison commitment.

27 And I guess we can handle this one a couple ways,
28 if you want to go downstairs and check to see if it's

1 there; if not, I'm sure Wanda would make you a copy
2 right now.

3 (Short discussion off the record)

4 THE COURT: All right. You ask to be
5 relieved.

6 MS. LEVY: Yes, Your Honor.

7 THE COURT: And, Mr. Pyle, you are willing to
8 complete this?

9 MR. PYLE: Yes.

10 THE COURT: All right. Then, Ms. Levy will be
11 relieved.

12 Well, let me do this, Mr. Kilgore. I haven't
13 asked you about that. Who would you rather have
14 represent you for purposes of sentencing: Ms. Levy or
15 Mr. Pyle?

16 THE DEFENDANT: Mr. Pyle.

17 THE COURT: Ms. Levy is relieved then. Mr.
18 Pyle is appointed for the purpose of sentencing.

19 Let me get you this. Wanda, here it is. In
20 terms of timing?

21 MR. PYLE: Mr. Stallworth and I are engaged in
22 battle in another matter.

23 THE COURT: That's ironic, but I guess Alameda
24 County is a smaller place than we sometimes think.

25 MR. PYLE: So, I'm going to be, or starting
26 that this afternoon, I guess.

27 THE COURT: Is that a four-day court?

28 MR. STALLWORTH: Yes, Your Honor.

1 THE COURT: Could I have our futures list,
2 please?

3 I know the probation report contains a number of
4 written statements that were submitted by others for
5 attachment. Are you going to want to have a person or
6 persons to speak at the sentencing hearing? Anybody
7 additional want to speak?

8 MR. STALLWORTH: No, Your Honor. If your
9 Friday calendars are busy, I know they can be, I think
10 because both Mr. Pyle and I are in the same trial in
11 front of Judge Conger --

12 THE COURT: And she is on Fridays, also.

13 MR. STALLWORTH: We can probably do one day.
14 We will start later in the morning or later in the
15 afternoon.

16 THE COURT: My Fridays are not necessarily
17 that busy.

18 MR. STALLWORTH: Okay.

19 THE COURT: And I'm trying to clean those out.
20 They are busy on the first and third Friday but not
21 necessarily on the second and fourth. And probably this
22 Friday may be a little soon.

23 But the 26th, which is the fourth Friday of the
24 month, hopefully that will allow you time to evaluate
25 the probation officer's report.

26 MR. PYLE: I'm sorry. Which Friday?

27 THE COURT: The 26th.

28 THE CLERK: March 26th.

1 MR. PYLE: I'm scheduled to be at a
2 conference, Bar Association matter, all day that day.

3 THE COURT: The latest I would be willing to
4 go would be April the 9th. And the reason I'm picking
5 these odd Fridays is to allow counsel time enough to say
6 whatever they want to say.

7 As Mr. Stallworth suggests, if we get into one of
8 those before your trial begins in the other court in the
9 morning, for one, you are going to feel pressured here;
10 and, two, you are going to feel pressured there.

11 MR. PYLE: The 2nd of April?

12 THE COURT: The 9th.

13 MR. PYLE: All right. We will make it the
14 9th.

15 THE COURT: Mr. Stallworth?

16 MR. STALLWORTH: That's fine, Your Honor.

17 THE COURT: That will be for report and
18 sentence.

19 MR. STALLWORTH: Thank you, Your Honor.

20 THE COURT: And if there is going to be any
21 motions or action based on the probation officer's
22 report or any other issue, please either side notify
23 counsel so that we can deal with those.

24 MR. STALLWORTH: We shall.

25 THE COURT: Thank you.

26 MR. STALLWORTH: Thank you, Your Honor.

27 ---o0o---

1 FRIDAY, APRIL 9, 2004

2 ---o0o---

3 - P R O C E E D I N G S -

4 ---o0o---

5 PROCEEDINGS ON SENTENCE

6 THE COURT: In the matter of People versus
7 Kilgore, No. 141033.

8 Counsel, your appearances this morning?

9 MR. STALLWORTH: Darryl Stallworth for the
10 People.

11 MR. PYLE: Walter K. Pyle for the defendant.

12 THE COURT: Today is the day set for report
13 and sentence. I have received, read and considered the
14 probation officer's report along with attachments
15 thereto.

16 Mr. Pyle, you have filed some motions with regard
17 to those things. I guess we ought to go through those
18 first.

19 First of all, turning to the sentencing memo that
20 you filed yesterday, I am assuming you received a copy
21 of that, Mr. Stallworth, although somewhat belatedly.

22 MR. STALLWORTH: Yes, Your Honor.

23 THE COURT: Turning to the first issue that
24 deals with objection to circumstances in aggravation,
25 described in the probation officer's report, I believe
26 what you are referring to is those listed under the
27 criteria of the sentencing factors, rule 421 at the top
28 of page 4 of the probation officer's report?

1 MR. PYLE: Yes.

2 THE COURT: Just in looking at that, given the
3 required sentence for this particular conviction, I
4 don't know that factors in aggravation and factors in
5 mitigation really apply. I think your objections are
6 well noted.

7 What I'm going to do -- and I don't know if you
8 wish to be heard on this, Mr. Stallworth, or not -- but
9 I will just direct the clerk to send a copy of this
10 particular motion as attendant to the documents that go
11 to the Department of Corrections, so it becomes a part
12 of their file.

13 So, your objections will be noted and set forth
14 at this time.

15 You wish to be heard on it?

16 MR. STALLWORTH: That's fine, Your Honor.
17 Submitted.

18 THE COURT: In terms of objection to the
19 imposition of the use enhancement, that's an interesting
20 issue. During the course of this trial -- in fact in
21 its fairly early stages -- I think there was a case that
22 looked at this issue, and I believe its name was People
23 vs. Navarro, and it was in a slip opinion from March
24 19th of '03. I brought it to counsel's attention, and
25 it was later rebrought to my attention by Ms. Levy.

26 In preparing for today's hearing, I tried to find
27 the cite for that case and was directed to 106 Cal.App.
28 4th page 1444. And in the hardbound volume it wasn't

1 there.

2 So, my investigation had to proceed a little
3 further. What I found is that the matter had been
4 reviewed and some modifications were made, but on June
5 25th of '03, the matter was ordered nonpublished,
6 meaning it is not citable authority.

7 The case stood for the proposition, in facts very
8 similar to these, that where there has been a finding of
9 first-degree murder with the, quote, unquote, drive-by
10 special circumstance, that an additional sentence was
11 not applicable under 12022.53(j). That section requires
12 that the penalty be imposed but not if another section
13 requires a greater penalty, which in this case it would,
14 although not.

15 Although not discussed in it, and I don't know if
16 you can 654 enhance it or not -- I have got my own
17 thoughts on what that's about -- but I understand your
18 motion clearly, and there was a case that, and I'm not
19 aware of any other case on the books that discusses that
20 precise issue. I did not have the research attorney
21 look at it.

22 Did you have anything further with regard to that
23 part of your motion?

24 MR. PYLE: I don't, Your Honor. I wasn't able
25 to find anything, either.

26 THE COURT: Mr. Stallworth, any thoughts as to
27 that part?

28 MR. STALLWORTH: I would state that it appears

1 to be fine with the People that the greater punishment
2 under the special circumstance finding would be lead in
3 the Court's ultimate decision and the sentencing today,
4 and the People come to both with that acknowledgment and
5 would not need to suggest or request the enhancements
6 under the less severe punishment involving the verdicts
7 in this case.

8 THE COURT: You wish to be heard?

9 MR. PYLE: No, Your Honor.

10 THE COURT: What I would intend to do is this:
11 is to not impose any additional sentence for that
12 particular enhancement, but rather stay imposition of
13 any further sentence as to that enhancement until and if
14 the judgment becomes final. At that point the stay
15 would become permanent. I'm not going to impose an
16 additional term at this point.

17 Next is your objection to use of the prior
18 conviction, pointing out that the conviction for first-
19 degree manslaughter in Oklahoma was the equivalent of a
20 conviction of involuntary manslaughter in the State of
21 California, and, therefore, would not be considered
22 under California law to be probative of being a serious
23 or violent felony under California law.

24 It's my recollection that that issue was brought
25 up during the course of the trial, and I think all
26 parties agreed with basically the conclusion that you
27 came to. I think Ms. Levy presented a motion in that
28 regard. I think we looked at it. I think Mr. Stall-

1 worth got some further information on it. Somebody had
2 downloaded the Oklahoma statute, and we all had a chance
3 to look at it. And it's my recollection that we agreed
4 that the prior was not a serious or violent felony and
5 would not be used to enhance his sentence in that way in
6 this case.

7 Is that your recollection, Mr. Stallworth?

8 MR. STALLWORTH: Yes, Your Honor.

9 MR. PYLE: That's my understanding, too. I
10 put this in here because the probation report seemed to
11 imply perhaps maybe otherwise.

12 THE COURT: Perhaps two things can be heard
13 together. The last of your sentencing memorandum refers
14 to an objection to individual restitution to the
15 victim's family based on wages or profits lost, your
16 point being that the type of restitution that's claimed
17 in that, it claims both lost profits and the cost of
18 goods sold rather than an allocation of the profits
19 attributable to the goods, that's one objection; and the
20 other is that you question whether or not a family
21 member of a homicide victim is eligible for wages or
22 profits lost.

23 The other side of this is sort of collaterally
24 related. Is a declaration signed -- well, has he signed
25 the original?

26 MR. PYLE: Yes.

27 THE COURT: All right. I have a copy of it
28 here, of Mr. Kilgore indicating basically that he has no

1 ability to pay a restitution fine at this point given
2 the low wages currently available for prison work. You
3 wish to be heard further on that?

4 MR. PYLE: Just two points. Given the budget
5 crisis, I don't see any grounds to expect that's going
6 to improve in the future; second, I would request that
7 in the setting of a restitution fine that the Court also
8 take into consideration any direct restitution the Court
9 might order be paid.

10 THE COURT: As to part one, I would hope over
11 the next few years that the financial situation in this
12 state will improve. I think we are all hopeful of that
13 for a variety of reasons. I have given some thought to
14 the imposition of a fine and will take those factors
15 into consideration.

16 Any other legal reason why sentence should not be
17 pronounced?

18 MR. PYLE: No, Your Honor.

19 THE COURT: Formal arraignment waived?

20 MR. PYLE: Yes.

21 THE COURT: The defendant in this matter, Ivan
22 Kilgore --

23 MR. STALLWORTH: Your Honor --

24 THE COURT: I'm sorry.

25 MR. STALLWORTH: -- would it be okay --

26 THE COURT: It will. You indicated before we
27 started, and I apologize for moving on to deal with
28 legal issues rather than people issues, unfortunately.

1 You indicated to me before that a family member wished
2 to speak for a few moments?

3 MR. STALLWORTH: Yes, Your Honor.

4 THE COURT: Fine with me.

5 MS. ANDERSON: Talk, Your Honor?

6 THE COURT: I'm sorry. I almost forgot you.

7 MS. ANDERSON: Thank you, Your Honor.

8 And to Your Honor, Judge Kingsbury, and the
9 officers of this court, it has been a long three years
10 and four months waiting for this day. When I was first
11 told it would take three to four years to go through
12 this process, I -- I didn't believe it. But going
13 through it now, I understand the process and why you
14 take this long as it does.

15 My husband and I would like to thank the District
16 Attorney, Darryl Stallworth, for being our son's voice
17 in what was still and is still most an unbelievable and
18 difficult time for us. No parent should have -- should
19 ever have to go through this. We would like to thank
20 Your Honor for hearing our son's voice through Mr.
21 Stallworth.

22 On behalf of our son, his grandmother, his uncle
23 and his friends, we would like to thank you from the
24 bottom of our heart.

25 I wish I could say that putting this creature
26 away would stop the killing of our young men here in
27 Oakland, but it won't. But what it will stop, it will
28 stop this predator from preying on another victim and

1 causing hurt to another family, to ever go through what
2 we would go through or what we did go through. Now, the
3 predator becomes the prey, and has no control over his
4 destiny. This young man's concern and fear is how to
5 survive life.

6 Will was a loving and a delightful young man, and
7 we will love him forever. And I dare say Ivan Kilgore
8 will never forget a young man that he never knew.

9 And I would like to again say thank you on behalf
10 of my family. This has not been an easy process. No
11 mother should ever have to go through what I have gone
12 through losing a child, but I just like to thank
13 everyone for your patience with my family.

14 Thank you.

15 THE COURT: Thank you.

16 Let me say that -- and I know it came out some-
17 what even back as far as jury selection -- that I've had
18 three careers in the criminal justice system in Alameda
19 County, and the first was as a probation officer for
20 somewhat over ten years before I became an attorney.
21 And like the probation officer in this case, a man named
22 Jeff Wilson, who I don't recall ever meeting, one of my
23 assignments for the past five or six years that I was a
24 probation officer, the last five or six years was doing
25 just what Mr. Wilson did in this case, and that's inter-
26 viewing people who had been convicted of serious crimes,
27 several of them homicides, a few involving the death
28 penalty.

1 That career, coupled with this, sitting,
2 listening to homicide trials in this department, it's
3 troubling by the futility of it all that sitting,
4 listening to a trial, something happens: Bad decisions
5 are made out on the street, people that should not have
6 firearms settle trivial and minor disputes out of the
7 end of a gun, taking lives of other people who had a
8 right to live, and maybe had some problems themselves,
9 but a right to live and a right to enjoy their own
10 lives.

11 And as a probation officer talking to the
12 individuals that had committed these crimes, the whole
13 thing is just senseless. And in this case, again, the
14 whole thing was just senseless.

15 Mr. Kilgore was a person, regardless of exactly
16 what happened out there, who had no legal or any other
17 business having a deadly weapon such as a firearm. If
18 firearms are not present, these kinds of shootings would
19 not occur. It is so easy, so easy to stand at a
20 distance when you don't have to look somebody in the eye
21 and take their life face to face if you really think you
22 have the need to do so; but to do it such as in this
23 kind of case, there is just no explanation for that.

24 And I know Mr. Kilgore does not appreciate these
25 particular words. That's fine. But it's true. Mr.
26 Kilgore is a man that is filled with self-justification
27 for his act, and maybe he needs that to survive. He
28 should have learned after the Oklahoma experience that

1 life behind a gun can only lead to one eventuality, and
2 here you are.

3 Either counsel wish to add any remarks at all?

4 MR. STALLWORTH: No, Your Honor.

5 MR. PYLE: No, Your Honor.

6 THE COURT: As I indicated, then, Ivan
7 Kilgore, having been convicted of murder in the first
8 degree, and the jury having found true the special
9 circumstance that the murder in the first degree was
10 intentional and perpetrated by means of discharging a
11 firearm from a motor vehicle intentionally at another
12 person or persons outside the vehicle, with the intent
13 to inflict death, it's the judgment of this Court, and
14 it's hereby ordered, adjudged and decreed, that in
15 punishment for this offense, he be imprisoned in the
16 state prison in the State of California for the term
17 prescribed by law, which in this case is life without,
18 without the possibility of parole.

19 The jury also found true the allegation that, in
20 and during the commission and attempted commission of
21 this offense, the defendant personally and intentionally
22 discharged a firearm and proximately caused the death to
23 William Anderson, an enhancement under 12022.53 paren
24 (d) close paren of the Penal Code.

25 The Court has discussed this portion of the
26 sentence with counsel on the record this morning, and
27 the Court does believe that to enhance the sentence,
28 which would be 25 to life as an indeterminate term.

1 Under this particular code section, it would be viola-
2 tive of dual punishment statutes and also perhaps be
3 violative of 12022.53(j) of the Penal Code, since the
4 greater penalty is being imposed under the offense
5 itself.

6 Thus, for this particular enhancement, since mine
7 is the sentence, not until the final judgment of appeals
8 are taken, the Court will not impose an additional term
9 for this enhancement, but rather stay the imposition of
10 any additional enhancement pending the final order of
11 judgment in this case, or the finality of judgment in
12 this case, at which time the stay will become final.
13 Thus, I'm reserving the right to use this as an enhance-
14 ment if it should become applicable in the future.

15 By my record Mr. Kilgore, as of today, has 1,256
16 actual days of credit. He is awarded that credit.

17 In almost all types of cases, persons committed
18 to the Department of Corrections are entitled to conduct
19 credits, some 20 percent, some 50 percent. But in this
20 particular kind of offense, there are two code sections
21 that preclude credit. One of them, 190(e) of the Penal
22 Code, does provide for a pre-sentence conduct credit but
23 no conduct credit while a person is in prison, meaning
24 they have to serve the full term, 96 Cal.App.4th 66 at
25 page 71, People vs. McNamee, M-c-N-a-m-e-e.

26 Section 2933.2 of the Penal Code precludes pre-
27 sentence conduct credit, and that is noted in the
28 Supreme Court case of People vs. Cooper, 27 Cal.4th 38

1 at page 40 and 41 and footnote 2.

2 Now, given the sentence in this case, I don't
3 know that establishment of credits in this case is
4 particularly warranted. So, I'm saying these words for
5 the benefit of the future. So, the Court does award no
6 conduct credits pursuant to 2933.2 and People vs.
7 Cooper.

8 MR. PYLE: The Court will note our objections
9 to the declining to award conduct credits.

10 THE COURT: Do you have more than an
11 objection?

12 MR. PYLE: No, just to say that I think it's
13 violative of the 14th Amendment, the due process clause.
14 And that's all I will say at this point.

15 THE COURT: All right. So, in terms of other
16 parts of the sentence, the Court will order blood and
17 saliva samples pursuant to section 296, and the Court
18 has already signed that order.

19 MR. PYLE: The Court will note our objection
20 to that. It's violative of the 14th Amendment.

21 THE COURT: So noted.

22 The Court will order a restitution fine in this
23 matter of 65 hundred dollars pursuant to 12022.4 of the
24 Penal Code.

25 The probation officer also recommends a parole
26 restitution fine under 1202.45, but since under this
27 sentence the defendant is not eligible for that, the
28 Court will not specifically impose it. The Court would

1 impose it in an amount of 65 hundred dollars should it
2 become applicable at sometime in the future.

3 In terms of direct restitution to victims, I do
4 have a notice on behalf of the Victim's Compensation
5 claims through the State of California, the restitution
6 fund indicating that in claim 608643, \$5,000 was paid,
7 and is certainly orderable as restitution.

8 You wish to be heard as to that amount?

9 MR. PYLE: No, Your Honor. Submitted.

10 THE COURT: So, that will be ordered.

11 As to individual restitution, I did receive
12 attached to the probation officer's report a number of
13 impact statements and some loss issues in terms of funds
14 actually lost that amounts, to there is a page here, and
15 I asked, Mr. Stallworth, if you could clarify a bit for
16 me what that was. Did you have an opportunity to do
17 that?

18 MR. STALLWORTH: Yes. I spoke with the
19 family, and it was a document produced by both Mr. and
20 Mrs. Anderson that was reviewed by florist FTD in order
21 to come up with the figures for the lost time of work
22 and the services that they provide in their bridal shop.

23 THE COURT: So, this is lost earnings from --

24 MR. STALLWORTH: Their business while they
25 were here in court.

26 THE COURT: All right. And I think the total
27 on that, it says one thing, and then it was changed by
28 only a dollar. I'm assuming that was based on -- I see

1 it. I'm assuming that was based on the math involved.

2 MR. STALLWORTH: Yes.

3 THE COURT: And you have stated your position
4 in writing.

5 You wish to be heard further?

6 MR. PYLE: No, Your Honor. But I will
7 actually incorporate our written objections on page 3 of
8 my memo.

9 THE COURT: The Court will order that amount,
10 \$1,162.54. And that will be payable to Samuel or Gerlen
11 Anderson.

12 THE CLERK: Samuel --

13 THE COURT: Samuel or -- and Gerlen is
14 G-e-r --

15 MS. ANDERSON: Gerlen.

16 THE COURT: I'm sorry. G-e-r-l-e-n Anderson
17 and the address noted in the probation officer's supple-
18 mental.

19 Just because it's noted here, I will indicate for
20 the record the probation officer recommends that the
21 defendant participate in an anger management program
22 while in prison.

23 Mr. Kilgore, I want to inform you of your
24 appellate rights. And I'm sure, given the amount of
25 work that you have done on your own case, you are
26 probably quite well aware of your appellate rights
27 already, but let's make sure we are all on the same
28 page.

1 You do have a right to appeal. Your Notice of
2 Appeal has to be filed within 60 days. It needs to be
3 filed in the Alameda County Superior Court rather than
4 the Court of Appeal.

5 And just by your gestures between you and
6 counsel, I'm gathering that's already been prepared and
7 will be filed?

8 MR. PYLE: We intend to file it.

9 THE COURT: All right. You are aware that the
10 Notice of Appeal must indicate clearly that you are
11 appealing -- Mr. Pyle prepared this, I'm sure he did
12 that -- and what it is you are appealing from, whether
13 or not it's the entire judgment or some particular part
14 of it.

15 Do you understand that you have those rights?

16 THE DEFENDANT: Yes.

17 THE COURT: And the requirements you have to
18 file the notice within 60 days.

19 THE DEFENDANT: Yes.

20 THE COURT: Anything further by either side?

21 MR. PYLE: No, Your Honor.

22 MR. STALLWORTH: No, Your Honor.

23 THE COURT: Mr. Kilgore then will be remanded
24 to the Sheriff of Alameda County for delivery to the
25 Department of Corrections pursuant to this order.

26 MR. STALLWORTH: Thank you, Your Honor.

27 THE COURT: Thank you, gentlemen.

28 ---oOo---

1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF ALAMEDA)
4

5 CERTIFICATE OF REPORTER

6 I, GERALD A. DOHRMANN, Certified Shorthand
7 Reporter, do hereby certify that I am an Official Court
8 Reporter of the Superior Court of the State of
9 California, and that, as such, I reported the
10 proceedings had in the above-entitled matter at the time
11 and place set forth herein.

12 I further certify that my stenograph notes were
13 thereafter prepared by computer-assisted transcription
14 into typewriting, and that the foregoing pages numbered
15 1 through 1102 constitute a full, true and correct
16 transcription of said notes in the above-entitled
17 proceedings.

18 Dated at Oakland, California, this 12th day of
19 April, 2004.
20

21 GERALD A. DOHRMANN
22 GERALD A. DOHRMANN, C.S.R. 2046
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